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Alison Barnes

Marquette University Law School, alison.barnes@marquette.edu

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THE CONUNDRUM OF SEGREGATION'S ENDING: THE EDUCATION CHOICES

ALISON BARNES*

I. INTRODUCTION

In 2004, a remarkable number of citizens and scholars nationwide observed the fiftieth anniversary of the Supreme Court's first announced opinion in the four consolidated cases captioned *Brown v. Board of Education*.¹ Perhaps more notably, commentators polarized on the significance of the *Brown* decision in the history of race relations, despite the fact that the opinion struck down the Supreme Court's 1896 opinion in *Plessey v. Ferguson*,² which recognized as equality³ a black man's exclusion from the white-only railway car on the pretext that whites were excluded from traveling in the cars for blacks.⁴ For some, particularly African American scholars expert in education, the end of legal public segregation has a bitter taste given the persistence of de facto disparity in resources and outcomes for too many young black citizens.⁵ The triumph of law and advocacy for legal change for some is bankrupt.⁶

* Professor of Law, Marquette University Law School.

1. 347 U.S. 483 (1954); see Kathleen Sullivan, *What Happened to Brown?*, 51 N.Y. REV. BOOKS, No. 14, at 47 (Sept. 23, 2004) (commenting on the history of desegregation since *Brown*).

2. 163 U.S. 537 (1896).

3. U.S. CONST. amend. XIV, § 1 (stating, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

4. *Brown*, 347 U.S. at 494-95.

5. See generally DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2005); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004).

6. Many credit the loss of momentum for equality and desegregation to the second *Brown* decision, delayed one year to determine the appropriate remedy for racial segregation. Commonly called *Brown II*, the opinion of the Court ordered that progress toward nondiscrimination in school admissions proceed "with all deliberate speed." *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955). In contrast, many saw an end of legal segregation as a sufficient goal. For example, Irvin Charne, counsel for the plaintiff in the Milwaukee school desegregation cases of the 1970s, stated his opinion: "Quality of education was not an issue; [legal] desegregation was to remedy a wrong." Videotape: Remarks of Irvin B. Charne (April 8, 2004) (on file with the author). See also Bob Herbert, *Regressing on Integration*,

Others believe that a fair start on equalization of racial and ethnic disparities in education was undertaken, or at the least, attempted. The commentary, unfortunately, shifts to criticism of those who did not benefit from better opportunity. For example, two notable scholars, writing together, assert that the culture of blacks and Hispanics must be the cause of ongoing academic failure.⁷ The issue, for some, comes down to the very soundness of a policy of integration. Is that policy a just and useful response to the harms of American segregation? Or is it a denial of the power of the African American community (or other ethnic minority groups such as Latino or Native American) to address its own important issues rather than to seek a place in a reluctant, white-dominated society?⁸

In Milwaukee, the tension in the celebration of *Brown* is particularly sharp.⁹ Despite education programs that are among the broadest in scope in the United States, students of urban, ethnic minority backgrounds in Milwaukee Public Schools record achievements with the greatest disparity from suburban, largely white students in the same grades.¹⁰ By some measures, the disparity is the largest in the country. Despite gains since 2000 and renewed efforts on many fronts, the coming of age of still more children lacking job market skills and a sense of purpose is, in short, a shame.¹¹

N.Y. TIMES, Apr. 26, 2004, at A23 (noting that at the time of the decision "[m]any [blacks] were routinely addressed by whites as nigger . . . and the all-too-frequent response was yessir or no ma'am. Segregation was the norm in places of public accommodation In Topeka . . . 2,158 whites [were] employed in retail sales. The grand total for nonwhites was 11.").

7. See generally ABIGAIL THERNSTROM & STEPHAN THERNSTROM, NO EXCUSES (2003). See also *infra* notes 62-65 and accompanying text (discussion of public comments by comedian Bill Cosby).

8. See generally SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004) (considering the intermingled issues of race and class, integration, and institutionalized separatism); see also, THERESA PERRY, CLAUDE STEELE & ASA HILLIARD III, YOUNG GIFTED AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS (2003).

9. Videotape: Remarks of Dr. Howard Fuller, Distinguished Professor of Education, Founder and Director of the Institute for the Transformation of Learning, Marquette University and former Superintendent of Milwaukee Public Schools (April 8, 2004) (on file with the author). Dr. Fuller declined to write for this symposium or to have his remarks transcribed for publication. Briefly summarized, Dr. Fuller has come to find the *Brown* decision a poor touchstone for African American opportunities and is angry at the number of young people killed or imprisoned.

10. See *infra* notes 27-45 and accompanying text.

11. See, e.g., Sam Schulhofer-Wohl, *Report Says Vouchers Fall Short*, MILWAUKEE J. SENTINEL, May 20, 2001, at B1 (asserting that lack of space in choice schools prevents parents from making meaningful choices with their vouchers); Diana Jean Schemo, *Voucher*

One point of contention is the widespread belief that Milwaukee continues too little changed after forty years of desegregation policy, despite litigation in the mid-1970s that led to court-ordered and court-supervised busing of children to integrate the public schools. As the case of *Armstrong v. Brennan*¹² recounts, the black population of Milwaukee had grown rapidly between 1950 and 1970, with great concentration in the center of the city.¹³ The school district, comprised of the entire area of the city, had a student population thirty-five percent black, yet among the 121 elementary schools, for example, seventy-one were ninety percent white and twenty-three were ninety percent black.¹⁴ In total, three fourths of black students attended schools that were at least eighty percent black.¹⁵

The court acknowledged the school board's policy of neighborhood schooling.¹⁶ However, it found other indicators of intentional race discrimination, including drawing boundary lines to contain black neighborhoods,¹⁷ so-called "intact" busing¹⁸ that moved the teacher along with the students from the overcrowded black schools to facilities in a white school,¹⁹ and transfer policies that allowed a student to change schools upon approval by the receiving school. The policy might allow black students to go to white schools, but it more often allowed white students to leave their neighborhood black schools.²⁰

The persistent segregation of many urban areas is attributed by some to the phenomenon of "white flight," the exit of families with sufficient means to higher cost communities in the suburbs.²¹ Some

Study Indicates No Steady Gains in Learning, N.Y. TIMES, Dec. 9, 2001, at A33 (discussing a national Rand Corporation study about vouchers and charter schools).

12. 539 F.2d 625 (E.D. Wis. 1976).

13. *Id.* at 629.

14. *Id.*

15. *Id.* at 628-29.

16. *Id.* ("The goal was to assign students to schools within walking distance of their homes in order to foster a close relationship between community and school, maximize convenience for students and their families, and minimize compartmentalization of the student's life between home and school.").

17. *Id.* at 630.

18. *Id.* at 631.

19. E-mail from Sharon Jackson, Milwaukee Public School teacher, to Phoebe Williams, Professor of Law, Marquette University Law School (March 30, 2004, 17:19 CST) (on file with the author). Sharon Jackson is a Milwaukee Public School teacher who became one of the first black teachers to teach at a predominantly white public school.

20. *Armstrong*, 539 F.2d at 631-32.

21. See Wilbur C. Rich, *Putting Black Kids into a Trick Bag: Anatomizing the Inner City Public School Reform*, 8 MICH. J. RACE & L. 159, 166-68 (2002); but see John Gurda, *A Segregated Metropolis? Take a Closer Look*, MILWAUKEE J. SENTINEL, June 3, 2001, at 1J

cities used busing to balance school districts regionally,²² but by the time of Milwaukee's court-supervised busing, the Supreme Court had cut off such plans by its finding that only intra-district busing was an allowed remedy for segregated schools.²³ Thus, the intra-district busing plan was the extent of the Court's remedy, while Milwaukee's white population could more promptly move out of deteriorating neighborhoods, deteriorating them still further. The migration and polarized attitudes of some suburban residents with regard to urban poverty and to cities themselves, is a public policy divide.²⁴ When a number of communities are confronting forces for resegregation, Milwaukee's never-desegregated inner city may again come to share its persistent problems of educational equity with other cities.²⁵

II. A MILWAUKEE EDUCATION

What has Milwaukee done for the education of its children? It is a national pioneer in the various forms of "school choice," a movement that arises out of the perception that not all traditional public schools

(asserting that the housing choices of inner city African Americans are following the paths of other immigrant ethnic groups before them, moving into housing stock that improves along a path through the city's northwest side). The divisive attitudes of city and suburbs are illustrated in *Housing and Arrogance*, MILWAUKEE J. SENTINEL, Aug. 4, 2005, at 18A (citing remarks by suburban Brookfield's mayor referring to "Schmuckville" for stores on an undesirable edge of the town and, more recently, by a Brookfield alderman: "I personally see no need to provide affordable housing. Is it a crime to live in an area that college and high school graduates cannot afford?") The alderman also expressed the concern that the quality of multifamily housing might deteriorate, and "the quality of residents [might] deteriorate" with it.).

22. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); see generally Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63 (2002); John Charles Boger, *The Resegregation of Southern Schools? A Crucial Moment in the History (and Future) of Public Schooling in America: Do Southern Schools Face Rapid Resegregation? Education's "Perfect Storm"? Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375 (2003).

23. See generally *Milliken v. Bradley*, 418 U.S. 717 (1974).

24. See generally James K. Gooch, *Fenced In: Why Sheff v. O'Neill Can't Save Connecticut's Inner City Students*, 22 QUINNIPIAC L. REV. 395 (2004) (discussing the impoverished cities versus the affluent suburbs in education equity). It is unclear the extent to which the issues turn on racism, or on poverty and class. See Tom Held, *State's Poverty Rate Rises Fastest in Nation*, MILWAUKEE J. SENTINEL, Aug. 31, 2005, at 3A (detailing the poverty of the Milwaukee inner city population as this article goes to press).

25. See Erwin Chemerinsky, *What Role Should Courts Play in Influencing Educational Policy?: The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003) (discussing issues of resegregation and its remedies).

offer to all students the education they need.²⁶ The first initiative, the Chapter 220 program²⁷ initiated in 1988, allowed students of low-income families to transfer out of their school district to any of perhaps twenty suburban public schools willing to accept them.²⁸ The public school funds followed the student to the district of enrollment.

Milwaukee, like many cities, has also established magnet schools²⁹ that offer targeted curriculum in well-adapted facilities in order to attract students from other districts into the city system.³⁰ Magnet school curricula might offer strong emphasis on values, discipline, and testing success; alternatively, they might offer emphasis on the arts or sciences, with facilities for such purposes.³¹ Such initiatives support the possibility of voluntary desegregation in the context of need-responsive, high-performance schools.³²

In 1990 the Wisconsin legislature created Milwaukee's voucher program, the first in the United States.³³ A voucher is a guarantee the parents take from the state education system when they transfer their child to a school other than their neighborhood school. The concept of Chapter 220 is expanded, however, in that the funds can be paid to approved private schools as well as public schools.³⁴ Vouchers are peculiarly controversial in that they are endorsed by many on the political left, because of the potential to help disadvantaged students,

26. Emily Van Dunk, *The Numbers Behind Choice in Milwaukee*, MILWAUKEE J. SENTINEL, Oct. 13, 2002, at 2J ("Milwaukee is 'ground zero' in the war over school choice.").

27. WIS. STAT. § 121.85 (2003-04).

28. Van Dunk, *supra* note 26. Wisconsin also has a statewide open enrollment program for low-income students.

29. 20 U.S.C. § 7204 (1994).

30. See John E. Chubb, *Charter Schools Inspire Partnership*, MILWAUKEE J. SENTINEL, Oct. 13, 2002, at 2J (magnet schools with 1400 children include the Milwaukee Academy of Science, led by regional institutions of higher education, and the Milwaukee Urban League Academy of Business and Economics, led by the Urban League and business leaders and educators); Rich, *supra* note 21, at 173.

31. Rich, *supra* note 21, at 173.

32. See *id.* However, the perception of an *uncomfortable* degree of integration is potentially enlightening; at least in 1970, fifty-seven percent of whites in the North and fifty-two percent in the South "objected to integration when blacks formed half or more of the student body." *Id.* at 173 n.79 (citing Jon Alston & Ben Crouch, *White Acceptance of Three Degrees of School Desegregation*, 1974, 39 PHYLON 216, 216 (1978)).

33. See generally JOHN WITTE, *THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM* (2000). Dr. Witte, Professor of Political Science at the Robert M. La Follette Institute for Public Affairs, University of Wisconsin, Madison, provided remarks at the Marquette Law School symposium, *Tomorrow's Children: Successful Education for Every Child* (October 20, 2004).

34. Resources on Private School Vouchers, <http://weac.org/resource/vouchpg.htm> (last visited October 4, 2005).

and by the political right, which would expand the distribution of vouchers to affluent parents who could thereby avoid expenditures they might otherwise make for private school tuition.³⁵ On each side, but especially on the left, critics of vouchers cite the potential to concentrate in the public schools students whose parents have too little interest in education to transfer their children out, and to return to the public schools those students who are deemed too troublesome to remain in their private schools.³⁶

The use of vouchers is closely aligned with charter schools, schools created to deliver an alternative curriculum within the public school system. As with magnet schools, the motivation springs from the perception that the public schools are not performing and some other approach is due. Charter schools are created and run by a wide range of educators, usually with the support of like-minded parents of prospective students, to create an education for their children more closely aligned with their own values and beliefs.³⁷ However, the voucher means that a child from a low-income family more often can go to a chosen school. Vouchers are available only to parents whose income does not exceed 175% of the poverty level. Vouchers, therefore, provide critical support to schools created to attract low-income parents, a matter of debate among educators.³⁸

Schools in Milwaukee's choice program numbered 115 in 2005.³⁹ Most charter schools are in the inner city near underperforming public

35. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2089 (2002) (discussing the Milwaukee political alliances for voucher approval). This is an excellent article on the interaction of the various choice programs, that is, vouchers, charters, and magnets, including extensive information on Milwaukee school choice.

36. See Howard Gardner, *Paroxysms of Choice*, 47 N.Y. REV. BOOKS 16 (Oct. 19, 2000) (noting that Presidents (George Herbert Walker) Bush and Clinton, and then presidential candidates (George W.) Bush and Gore all advocated charter schools); but see John O. Norquist & Nancy van Meter, *Your Choice*, MILWAUKEE J. SENTINEL, Oct. 13, 2002, at 1J (offering various points for and against the existence and expansion of voucher use).

37. See Gardner, *supra* note 36 (noting that the charter school is quintessentially American, in that it is a voluntary association for a particular purpose).

38. See Rich, *supra* note 21, at 179 nn.102-03. Since 1990, according to a report of the Public Policy Forum, 118 schools have participated in school choice, of which fifteen have ceased to participate. Of those, four schools became charter schools, four merged with a Catholic school, and one stopped taking voucher students. In addition, five closed when administrators were charged with criminal financial mismanagement of the school. Schulhofer-Wohl, *supra* note 11. See also, Editorial, *Lift the Cap, Governor*, MILWAUKEE J. SENTINEL, Aug. 19, 2005, at 16A (urging voucher choices for more affluent students).

39. Alan J. Borsuk & Sarah Carr, *Lessons From the Voucher Schools*, MILWAUKEE J. SENTINEL, June 12, 2005 at 1A.

schools.⁴⁰ Charter school curricula range from disciplined teaching of math and reading skills, represented especially by the for-profit Edison Schools, to specialized accelerated learning programs.⁴¹ Results of the journalists' study indicate that perhaps ten percent of choice schools "demonstrate alarming deficiencies" and that some of the weakest remain in operation although parents should realize their children are not receiving an adequate education.⁴²

Many parents wished to use their vouchers to send their children to religious schools, particularly schools that were well established and represented familiar entities and values. Cleveland, Ohio was the first city to receive authorization, which prompted a controversial expansion of voucher programs in 1996 when the state legislature authorized the \$2250 voucher payment for parochial schools.⁴³ Milwaukee followed, and plaintiffs seeking to prevent the expenditures as a violation of separation of church and state were disappointed when the Supreme Court denied certiorari.⁴⁴ In 2005, however, journalists report that about seventy percent of students attending schools on vouchers were in religious schools, and that the choice program has revitalized Catholic,

40. See F. HOWARD NELSON, BELLA ROSENBERG, & NANCY VAN METER, AMERICAN FEDERATION OF TEACHERS, CHARTER SCHOOL ACHIEVEMENT ON THE 2003 NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (August 2004); Videotape: Remarks of John Witte, author of a book on voucher use in Milwaukee (April 8, 2004) (noting that charter schools and voucher parents seem in action to be concentrated in inner city, African American families); Gardner, *supra* note 36; John F. Witte, *School Choice in Action: The Milwaukee Voucher Program*, 10 GEO. MASON U. CIV. RTS L.J. 139, 143-44 (2000) (noting that upon reaching the highest grade in their charter school, about half of students returned to Milwaukee Public Schools, some to magnet schools and some to neighborhood schools).

41. See WIS. STAT. § 118.40(1m)(b)(9) (2003-04) (concerning racial and ethnic balancing in Wisconsin charter schools.)

42. Borsuk & Carr, *supra* note 39, at 1A; Schemo, *supra* note 11, at A33.

43. See Rich, *supra* note 21, at 179; see also Ann M. Markey, *Something is Rotten in the State of Wisconsin: Why State Sponsored School Tuition Programs Smell to Heaven*, 1999 L. REV. MICH. ST. U. DET. C.L. 751 (arguing that vouchers should not be used for parochial schools because they represent the establishment of religion); June Kronholz & Robert S. Greenberger, *Supreme Court Ruling Gives Boost to Proponents of School Vouchers*, WALL ST. J., June 28, 2002, at A1 (states planning to start their own voucher programs after the five to four decision announced in the 2002 term).

44. Jackson v. Benson, 578 N.W.2d 602, 608 (Wis. 1998). See generally Jennifer A. Henrikson, Jackson v. Benson, *School Vouchers—Offering an Apple to Private Schools; Creating a Serpent for Public Schools?* 75 CHI.-KENT L. REV. 259 (1999) (discussing the Wisconsin Supreme Court opinion and calling for the U.S. Supreme Court to limit the use of vouchers if those funds cannot realistically be separated from other funds). But see Alan J. Borsuk, *Choice School Rules Tighten*, MILWAUKEE J. SENTINEL, Aug. 18, 2005, at 1A (describing changes in policy in response to the recognition that poorly conceived and poorly performing voucher schools must be restricted by the State Department of Public Instruction).

Lutheran, and other religious schools.⁴⁵

III. PAYING FOR EDUCATION

One implication of ineffective education for some young people is that money appropriated for the educational purposes is not well spent. Yet, it is unclear whether the allocations to Milwaukee Public Schools are simply inadequate for the purpose,⁴⁶ as opposed to ineffective for any of a number of other reasons. Funds for school districts are raised in significant part by property taxes but are supplemented by state and federal funds according to the shortfall of property values in specific districts.⁴⁷ Property taxes are, perhaps, an important measure of voter focus on school expense in overall costs. However, changes in the annual property tax assessment cause changes in the funds for education only to the extent the formulae or some legislative or administrative intervention do not trigger a compensating increase in government aid to the district.

In 2004, the Governor's Task Force on Educational Excellence⁴⁸ recommended an increase in the sales tax, with a property tax cut.⁴⁹

45. See generally Borsuk & Carr, *supra* note 39; Alan J. Borsuk, *Religious Schools are a Top Choice*, MILWAUKEE J. SENTINEL, June 15, 2005, at 1A; Sarah Carr & Leonard Sykes, Jr., *Big "C" or little "c" Catholic?*, MILWAUKEE J. SENTINEL, June 15, 2005, at 1A. On the evolution of religious schools and the importance of evaluation of their merits in society, see Neal Devins, *Religion in the Public Square: Social Meaning and School Vouchers*, 42 WM. & MARY L. REV. 919 (2001) (Catholicism evolved since Vatican II (at least in the USA and Europe) to be more socially and politically accommodating of diverse populations and, perhaps, secular humanist values.).

46. Recurring issues revolve around negotiation with the teachers' union, the Wisconsin Education Association Counsel ("WEAC"). Videotape: Remarks of Stan Johnson, President of WEAC (October 20, 2004). A growing number of cities are creating exceptions to the monopoly of teachers' unions by creating schools outside their public school systems. See, e.g., Sam Dillon, *Chicago Has a Nonunion Plan for Poor Schools*, N.Y. TIMES, July 28, 2004, at A15.

47. See *Vincent v. Voight*, 2000 WI 93, ¶¶ 6-27, 614 N.W.2d 388, 397-401 (providing the proportions of property tax and other funds directed to school finance in 1997-98). The court notes that the state funds "poor" school districts to a greater degree than more affluent districts; in 1996-97, the more affluent district of Mequon-Thiensville received from the state 10.6% of its per pupil cost of \$6840. In contrast, the less affluent district of Antigo received 77.2% of its per pupil cost, which was \$6014.20 per pupil. *Id.* at ¶ 74 n.23, 614 N.W.2d at 412 n.23.

48. Task Force Chair Michael J. Spector was a speaker at the symposia on April 8 and October 20 of 2004. See Videotape: Remarks of Michael Spector (April 8 & October 20, 2004) (on file with the author).

49. See GOVERNOR'S TASK FORCE ON EDUCATIONAL EXCELLENCE REPORT 14 (June 30, 2004) (noting that "75% of [Wisconsin] school districts spend between \$7000 and \$9000

Community news reported a recommendation to cut property taxes by twenty percent, rein in school board adjustments to teacher salaries, pay more for smaller classes, and provide higher compensation for education of students with disabilities.⁵⁰ A month later, a divided Task Force recommended an increase in sales tax to make up shortfalls in revenues.⁵¹ The issue of short revenues was already known in the Milwaukee Public Schools because of the district superintendent report of April 2004, which called for significant cuts in staff and the need for a jump in city property taxes.⁵² In August 2005, Governor Jim Doyle used the line item veto to restore school funds cut by the majority Republican Wisconsin legislature.⁵³

Federal funds also are at issue, particularly in light of the first federal initiative to control the quality and content of school curricula. Ongoing federal funds for schools are tied to success in the terms of No Child Left Behind ("NCLB"),⁵⁴ which requires schools to meet set standards of student performance as demonstrated on standardized tests. Fierce criticism has arisen against the mandate, particularly that the mandate is

per pupil" for instruction and administration); see also FINAL REPORT SECTION 2, PROMOTING SCHOOL FUNDING THAT IS ADEQUATE AND EQUITABLE FOR WISCONSIN'S CHILDREN AND TAXPAYERS 57-69 (detailing the above generalization and comparing with the proportion of funding sources in some other states).

50. See Amy Hetzner, *Sales Tax Boost Urged to Fund Schools*, MILWAUKEE J. SENTINEL, June 2, 2004, at 1A; see generally Colloquium, *Wisconsin Tax Policy*, 88 MARQ. L. REV. 1, 1-193 (2004) (discussing issues of state revenues and allocations).

51. See Amy Hetzner, *Increase in Sales Tax Advocated*, MILWAUKEE J. SENTINEL, June 23, 2004, at 1A. While such adjustments are not uncommon, a net loss to the purpose receiving alternative funding is almost inevitable. In California, for example, the Proposition 13 approval that reduced property tax revenues by sixty percent was not met with an increase in some other source of support for schools.

52. See Alan J. Borsuk, *MPS Expects Big Cuts in Staff, 15.4% Levy Leap*, MILWAUKEE J. SENTINEL, Apr. 27, 2004, at 1A. The soundness of the recommendations was questioned by symposium speaker George Lightbourn, *Education Task Force: New Wrapping Can't Disguise Old Ideas*, WIS. INTEREST, Fall 2004, at 27-32 (questioning particularly the temporary nature of the property tax cuts, the unsustainable commitment of the state's budget to schools, and the specific question regarding teachers' pay, which is the rising cost of health care).

53. Governor Doyle struck legislative budget bill provisions that lifted constraints on school choice programs, allowing non-poor families to use an allocation of public school funds for any accredited school. Sarah Carr, *Budget Lifts Limits on Choice*, MILWAUKEE J. SENTINEL, June 4, 2005, at 1A. However, many are interested in the potential of the charter school program. See *By the Numbers*, MILWAUKEE J. SENTINEL, Aug. 8, 2005, at 1B (stating that Wisconsin received a federal grant of \$17 million in the preceding week for expansion and evaluation of charter schools).

54. No Child Left Behind Act of 2001, 20 U.S.C.A. § 6301 *et seq.* (West 2003 & Supp. 2005).

under-funded⁵⁵ and undermines sound teaching by placing excessive emphasis on a test that may not be a valid measure of achievement, particularly for minority students. Schools in more affluent districts nationally also are shocked to find their students may be labeled as “failing.”⁵⁶ Lack of funds to support the mandate is ubiquitous,⁵⁷ and the Milwaukee area shares the pain.⁵⁸

Private philanthropy has taken up a role in “fixing” public schools for disadvantaged students, and Milwaukee is a beneficiary. The Gates Foundation, for example, has given funds to support the creation of small high schools—typically under 200 students—in accord with the ideas of Howard Fuller, a prominent African American educator and advocate for inner city students.⁵⁹ The concept relies on the ability of educators to reach out and influence young people on a personal level, to prevent truancy and crime. The implementation of success based on a smaller scale is questioned by a number of sources.⁶⁰ Interestingly,

55. See Alan J. Borsuk, *Paige Says Education Law is Amply Funded*, MILWAUKEE J. SENTINEL, May 25, 2004, at 1B (recounting the brief visit of the U.S. Secretary of Education to a Milwaukee school, during which he defended NCLB in light of comments by Wisconsin Attorney General Peg Lautenschlager that litigation might relieve under-funded school districts of the burdens imposed by the federal law). See Videotape: Remarks of Peg Lautenschlager (October 20, 2004) (on file with the author).

56. See Sam Dillon, *Good Schools or Bad? Ratings Baffle Parents*, N.Y. TIMES, Sept. 5, 2004, at A1 (recounting the shock of failing test scores at Hinsdale South, a Chicago-area school).

57. Editorial, *Campaign 2004: The Big Issues: How to Rescue Education Reform*, N.Y. TIMES, Oct. 10, 2004, at D10; see Jeannie Oakes, *Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California*, SANTA CLARA L. REV. 1305, 1360-62, 1373-75 (2003) (discussing test score accountability in California litigation expert testimony).

58. See Jamaal Abdul-Alim, *123 Schools Fall Short of Progress Standards*, MILWAUKEE J. SENTINEL, Sept. 18, 2004, at 9A (sixty-seven Milwaukee schools, approximately half, were on the list of those that failed to make “adequate yearly progress” under NCLB.).

59. Nahal Toosi, *Gates Foundation Gives Millions to MPS*, MILWAUKEE J. SENTINEL, July 15, 2003, at 7A; see also Sarah Carr, *School Year that Began Rocky Ends with Hope*, MILWAUKEE J. SENTINEL, June 7, 2004, at 1A (noting that the North Division School, with severe dropout rates, is divided into three separate “schools” in accord with the expectation that high school students will respond positively to personal involvement from teachers and administrators).

60. See, e.g., Clara Hemphill, *Small Isn't Always Better*, N.Y. TIMES, Nov. 8, 2003, at A27 (providing examples of small schools that have “replicated many of the problems” of prior larger schools, including mistrust between adults and students and physical violence). One aspect of good small schools, not unique to schools, is an environment in which each knows all other people, described as twenty-five teachers under a single administration and a total of 500 students or less. Another factor is a “charismatic principal.” See also Michael Winerip, *Good Teachers + Small Classes = Quality Education*, N.Y. TIMES, May 26, 2004, at A21; but see Sarah Carr, *Study Backs Earlier Class-Size Findings*, MILWAUKEE J. SENTINEL, June 2, 2004, at 3B (stating that only younger children benefit from lower student-teacher

Wal-Mart also donates to education.⁶¹

Comedian Bill Cosby, an advocate of education generally, took on a notable role in the Milwaukee Public Schools when his public comments, critical of parents who failed to supervise their children's activities and education, were the subject of a sharp rebuttal by local columnist Eugene Kane.⁶² Cosby called Kane and committed to lend his voice to encouragement of education success in Milwaukee.⁶³ Cosby directed his initial address in Milwaukee to an audience of largely African American, inner city parents at an inner city high school.⁶⁴ The visit drew much attention to the difficulties of the inner city and perhaps renewed resolve in city parents and residents. Bill Cosby revisited Milwaukee to speak with parents in the inner city early in August 2005.⁶⁵

IV. WHAT IS AN EDUCATION? FEDERAL AND STATE MEASURES

The federal government provides three principles regarding inner city schools. The newest, stated in legislation called No Child Left Behind,⁶⁶ mandates that the success of education must be measured by

ratios).

61. See Jim Hopkins, *Wal-Mart Heirs' Hefty Donations Influencing Education Reform*, USA TODAY, March 11, 2004, at B1 (Wal-Mart has donated \$701 million, in part for children's scholarships at private schools.); Tamar Lewin, *Young Students are New Focus for Big Donors*, N.Y. Times, Aug. 21, 2005 at A1.

62. Eugene Kane, *Cos Forgets Where He Started Out as a Child*, MILWAUKEE J. SENTINEL, May 20, 2004, at 1B; see also Leonard Pitts, *When it Comes to Race, There's Always Room for Candor*, MILWAUKEE J. SENTINEL, May 25, 2004, at 13A (responding to Cosby's remarks at a *Brown v. Board* commemoration that lower economic people are "knuckleheads" for their disinterest in education).

63. Eugene Kane, *So the Phone Rings, and It's Cosby*, MILWAUKEE J. SENTINEL, May, 23, 2004, at 3B.

64. See Meg Kissinger & Mark Johnson, *Cosby Urges City to Get Serious: Responsibility Can Cure Social Ills, He Says*, MILWAUKEE J. SENTINEL, Oct. 1, 2004, at 1A; Eugene Kane, *Cosby Didn't Let Down City; Let's Not Disappoint Him*, MILWAUKEE J. SENTINEL, Oct. 21, 2004, at 1A.

65. See Eugene Kane, *With Hope that We Shall Overcome Today, not Some Day, Cosby Returns*, MILWAUKEE J. SENTINEL, Aug. 14, 2005, at 3B (describing a visit planned for Wednesday, August 17, sponsored by black educators alliance, the Milwaukee Public Schools, Milwaukee County, and the City of Milwaukee. The program, by invitation only and in three venues, will include Milwaukee Public School students and their parents, community organizations, and foster parents who work with troubled young people. Cosby's stated purpose is to prompt immediate change in expectations and achievement for young inner city African Americans.); Meg Kissinger, *Cosby's crusade extols responsibility*, MILWAUKEE J. SENTINEL, Aug. 18, 2005, at 1A.

66. No Child Left Behind Act of 2001, 20 U.S.C.A. § 6301 *et seq.* (West 2003 & Supp. 2005).

standardized testing, and after repeated “failures,” no further federal money can be allocated to the school and the school is at risk of being closed.⁶⁷ In *Milliken v. Bradley*,⁶⁸ the Supreme Court established the second principle that busing between school districts, that is, between urban and suburban areas, is rarely justified.⁶⁹ However, funds to remedy the historical shortcomings of inner city schools were permitted and, indeed, might be compelled by the courts.⁷⁰ Third, the case of *San Antonio Independent School District v. Rodriguez* (the Rodriguez case)⁷¹ closed the federal court doors on claims of constitutional violations alleging funding inequality.⁷²

Wisconsin may have a stronger mandate for adjustment to the resources of struggling urban schools and their students in that the state constitution mandates an equal opportunity for education, the so-called uniformity clause, which has been interpreted as a constitutional guarantee of a sound basic education for each child.⁷³ Potential support is provided by the 2000 case of *Vincent v. Voight*,⁷⁴ in which plaintiffs, the Wisconsin Education Association Council (“WEAC”), and other teachers intervening on plaintiffs’ side, sought additional funds for public schools, arguing that more “high need” students attend public schools, including poor children and children with disabilities or limited English for whom special programs must be provided at the schools’ expense. Plaintiffs also argued that Milwaukee school choice and charter schools reallocate funds away from public schools.

The court, considering motions for summary judgment by both sides, noted the strong presumption of constitutionality accorded statutes and reviewed the formula for school funding. The formula, termed “elaborate,”⁷⁵ was comprised principally of property tax revenues and government aid,⁷⁶ including “equalization aid.”⁷⁷ Based upon its review

67. See *supra* notes 53-57 and accompanying text. Rich, *supra* note 21, at 185-86; Boger, *supra* note 22, at 1381 (calling “accountability” by testing one of the factors in a coming “perfect storm,” along with federal disengagement from supervision of school desegregation).

68. 418 U.S. 717 (1974).

69. *Id.* at 744-45; see Ryan & Heise, *supra* note 35, at 2052.

70. See *Milliken v. Bradley*, 433 U.S. 267 (1977) (so-called *Milliken II*, on the remedy available after *Milliken I*); see also Ryan & Heise, *supra* note 35, at 2055 (discussing *Milliken II* and the Detroit inner city schools at issue).

71. 411 U.S. 1 (1973).

72. *Id.* at 50-51; see Ryan & Heise, *supra* note 35, at 2059.

73. WIS. CONST. art. X, § 3.

74. 2000 WI 93, 614 N.W.2d 388 (Wis. 2000).

75. *Id.* at ¶ 47, 614 N.W.2d at 406.

76. *Id.* at ¶ 5 n.6, 614 N.W.2d at 397 n.6.

of the case law, the court adopted a new standard for the right to education, the standard of adequacy.⁷⁸ Adequacy has replaced analyses of equality of education in a number of states, the court observed, and has the benefit of being “grounded in broadly shared societal values concerning the importance of education and the obligation to provide for the basic needs of society’s least advantaged.”⁷⁹

Ultimately, the court denied the plaintiffs’ motion, citing their failure to demonstrate that any child lacks a basic education in any school district.⁸⁰ The evidence of “districts with better facilities, textbooks, and a larger teaching staff”⁸¹ was inadequate to prove beyond a reasonable doubt that their less well-funded districts were truly inadequate. Yet, it is not overly optimistic to believe the court left the door open to a stronger demonstration of inadequacy in some schools.

V. A WAY FORWARD

Is litigation still a useful catalyst in the search for racial equity? Speaker Chris Hansen, Senior National Staff Counsel of the American Civil Liberties Union, traced the ripples of change from *Brown* desegregation.⁸² The civil rights litigators who learned from *Brown* stayed involved in the peace marches and lunch counter sit-ins of the civil rights movement and found other institutions in urgent need of change: the prisons and jails, followed by the ubiquitous institutions for people with mental retardation or illness. Hansen notes the decisions that mark the federal courts’ reluctance to grapple further⁸³ as being tired and discouraged; he also notes that the state courts indicate they still are motivated to work hard because it is necessary and that the legal signposts in Wisconsin are worth the efforts of litigation.⁸⁴

In California, significant litigation is in progress to compel the state

77. *Id.* at ¶ 6 n.8, 614 N.W.2d at 398 n.8 (discussing “equalization aid”).

78. *Id.* at ¶ 3, 614 N.W.2d at 397.

79. *Id.* at ¶ 49, 614 N.W.2d at 407 (quoting Peter Enrich, *Leaving Equality Behind*, 48 VAND. L. REV. 101, 170 (1995)).

80. *Id.* at ¶ 54, 614 N.W.2d at 408.

81. *Id.* at ¶ 48-52, 614 N.W.2d at 406-07.

82. Videotape: Remarks of Chris Hansen (October 20, 2004) (on file with the author, transcript also available).

83. See generally *Milliken v. Bradley*, 418 U.S. 717 (1974) (rejecting the need for busing across school district boundaries); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (stating that inequitable education is not a constitutional harm).

84. See Hansen, *supra* note 82. With regard to the recent legal principles articulated for Wisconsin, see *supra* notes 74-79 and accompanying text (on *Vincent v. Voight*).

to address the needs of poor children, many with English as a second language, in *Williams v. State of California*.⁸⁵ Experts testifying in the case evaluate the impact on education of teacher quality, adequacy of instructional material and whether it can be used by the student at home,⁸⁶ and whether school facilities are clean, safe, and in good repair,⁸⁷ finding that these factors are “fundamentally important” to effective education that will prepare students for jobs and civic life⁸⁸. As one might expect, the qualifications and motivation of teachers have a measurable impact on students’ learning.⁸⁹ The summary of testimony observes that the state’s actions have failed to address these shortcomings for all students, or even to gather data to determine where needs exist.⁹⁰ They rely instead on the state’s assumption that failures measured by scores on standardized tests indicate lack of student and teacher motivation.⁹¹ The conclusion is that “[d]ecades of de jure and de facto segregation in housing, employment, and schooling meant that California’s glowing educational ‘averages’ masked stark disparities in the resources, conditions, opportunities, and outcomes between schools in whiter and wealthier communities and those in communities of color and of poverty.”⁹² One expert’s work includes a “risk index” for a school population, including such factors as the percentage of students whose families receive public support, qualify for reduced cost meals, or are native speakers of a language other than English.⁹³ Plaintiff’s arguments in *Williams* are based on often-repeated state policies that nevertheless have failed to guarantee quality and equal education to all students.⁹⁴

After fifty years, or thirty if the Milwaukee court order is the watershed, a significant question is: When? When does valuable equal education really begin?⁹⁵ The courts and many citizens believe that very

85. Jeannie Oakes, *supra* note 57 (summarizing the *Williams* case, which is still in litigation). Responses to interrogatories of experts listed in the appendix, *id.* at 1397, are available at Decent Schools for California, <http://www.decentschools.org/experts.php?sub=p-per> (last visited October 4, 2005).

86. *See* Oakes, *supra* note 57, at 1329-35.

87. *Id.* at 1314-15.

88. *Id.* at 1305.

89. *Id.* at 1311-15.

90. *Id.* at 1370.

91. *See id.* at 1345-46.

92. *Id.* at 1362.

93. *See id.* at 1333 n.73.

94. *Id.* at 1368-70.

95. *See* Kermit Hall, “We’ve Got to Get Working. . . . The Clock is Ticking”: Equity in

significant time is essential to change the attitudes of our deeply flawed society, to correct for the error of racist subjugation that began centuries ago. Is it wisdom or timidity represented by the *Brown II* phrase: “[W]ith all deliberate speed”?⁹⁶ A look around the country and the world suggests that the schools that make a difference can reach today’s children. For example, Tom Friedman of the *New York Times* writes of a far older system of rigid prejudice in India, of caste exclusion and segregation in the lowliest of work,⁹⁷ and he finds that the children in the first generation of appropriate education are ready to learn and aspire to creative achievement.⁹⁸

Similarly, at the ten-year-old Harlem Project, the education efforts are comprehensive in scope.⁹⁹ Founder Geoffrey Canada recognized that a standard array of social services programs left out more children than were served because only a few were motivated to attend. Rather than utilize social programs with particular purposes, Canada took as a project the 6500 children of a twenty-four-block area and their families, termed the Harlem Children’s Zone.¹⁰⁰ The Project seeks to address not all the urban poverty ills and wrongs, but only the problems that keep a child from succeeding in school.¹⁰¹

In Chicago, the impediment to substantial improvement in the schools was perceived by motivated business people to be protectionist unions for teachers in failing schools.¹⁰² The city drew up a plan to close forty elementary and twenty public high schools and to create new smaller schools under private management, outside the city’s teachers’

Education and the Legacy of Brown v. Board, 89 MARQ. L. REV. 115 (2005) (keynote speaker at the October 20, 2004, symposium, recognizing the losses created by passage of time and opportunities for educating young people).

96. 349 U.S. 294, 301 (1955).

97. Thomas L. Friedman, *Making India Shine*, N.Y. TIMES, May 20, 2004, at A31 (discussing the success of a school founded by a successful Indian-born technology entrepreneur teaching students from the untouchable caste. The curriculum begins with basic hygiene and socialization since the children have never had clean water or used a toilet or worn decent clothing. Nevertheless, the children aspire to professions and excel at Internet skills and other studies.).

98. *See id.*

99. *See* Paul Tough, *The Harlem Project*, THE N.Y. TIMES MAG., June 20, 2004, at 43-49, 66, 70-75.

100. *Id.* at 46.

101. *Id.* at 48.

102. *See* Sam Dillon, *Chicago Has a Nonunion Plan for Poor Schools*, N.Y. TIMES, July 28, 2004, at A15; *see also* Bob Herbert, *Failing Teachers*, N.Y. TIMES, Oct. 24, 2003, at 23 (discussing the failed classroom). Students “opt[] out of dealing with the classroom” by moving their desks towards the back of the room. The teacher interacts only with those who choose to remain in front. *Id.*

union contract.¹⁰³ While the move is viewed as much as political strategy as visionary education, it targets a better result than continuing the chronically underperforming schools.¹⁰⁴ That is, teachers must be willing to adopt methods that work, although admittedly their path to reasonable salaries and other advancement may be compromised.

If law has indeed fallen short of its potential to correct the wrong of inadequate education "with all deliberate speed," it has not failed to declare when society owes a discreet group of citizens a debt in the form of greater efforts for correction. The Supreme Court long ago provided another signpost in the legal landscape of adequate education, seldom referenced. In *Hernandez v. Texas*,¹⁰⁵ decided prior to *Brown*, the Court considered whether a Mexican American criminal defendant had constitutional protection to prevent discriminatory exclusion of other Mexican Americans from Texas juries.¹⁰⁶ The Court could not rely on the same reasoning offered in the later opinion because the plaintiffs argued they were white.¹⁰⁷ Since segregation by law was not disputed by the plaintiffs, despite being subject to discrimination, what was the difference between Texas jurors and those who were excluded? The excluded Mexican Americans—regardless of color or proportion in the population—suffered subordination in that the community considered them to be different.¹⁰⁸ The indications of subordination read like a list of race discrimination practices: restaurants refused Mexican Americans service, certain restrooms at the courthouse were reserved for whites only, and, notably, Mexican American children attended a segregated school that ended with the fourth grade.¹⁰⁹ By showing that no Mexican American had been seated on a jury for twenty-five years,¹¹⁰ the plaintiff met the burden of proof in his claim of violation of his right of equal protection under the Constitution.¹¹¹

Many from all backgrounds find it apparent that the loss of young people from productive society, as citizens, workers, and parents, carries a price tag too high for every citizen in (at least) southeastern

103. Dillon, *supra* note 102.

104. See also Chicago Public Schools: Every Child, Every School, <http://www.edplan.cps-k12.il.us> (last visited July 27, 2004).

105. 347 U.S. 475 (1954).

106. *Id.* at 476.

107. *Id.* at 478.

108. *Id.*

109. *Id.* at 479-80.

110. *Id.* at 482.

111. *Id.*

Wisconsin.¹¹² The views across the political spectrum are that generations, including many among current high school students, are being left behind by their society, its economy, and its ideals.¹¹³ The apt use of free market tactics is suspect in school choice for the poor or minimally educated, who often do not well understand either market choices or superior education for their children. Further, the future of Wisconsin and American society that inevitably will be ethnically and culturally diverse is at greater risk when any groups are marginalized.¹¹⁴ The greatest burden of isolation falls on the poor and poorly educated, but the burden of living with a smaller, homogenous population faces the isolationist elite. A fragmented, less productive society that includes alienated minorities is a future to be avoided.

Finally, it comes down to the query addressed first to each who attended the Marquette University Law School's first symposium on April 8, 2004: *What is a good education?*¹¹⁵ We used to know what was required but acknowledge now that the classics and the "dead" languages are not the measure of an educated person. One need not necessarily speak French or play the piano, the skills of a reasonably adept student in the earlier twentieth century. Models of productivity as efficient computer processing and as ruthless business dealings have come and gone (and will again).

To fill the education uncertainties, teachers put forward their own paths of education. One teacher, for example, hopes to mold her high school students into good future citizens with respect for others and themselves. To this end, she arranges for their service at nursing homes and day care centers, and she invites business professionals and artists to

112. See George Lightbourn, *Wisconsin's Quiet Crisis*, 89 MARQ. L. REV. 105 (2005) (noting that lack of education among Milwaukee workers depresses regional and state economies; within twenty or thirty years, Milwaukee can regain its status among great American cities, but must solve its workforce problems); see generally Michael R. Olneck, *Economic Consequences of The Academic Achievement Gap for African Americans*, 89 MARQ. L. REV. 95 (2005); Hall, *supra* note 95.

113. See Roslyn Arlin Mickelson, *Do Southern Schools Face Rapid Resegregation? The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513 (2003) (discussing studies of other school systems and regions); Alan J. Borsuk, *ACT Gap Indicates Blacks Less Prepared for College*, MILWAUKEE J. SENTINEL, Aug. 26, 2005, at 1A.

114. See generally Joseph P. Vitteritti, *School Choice: The Next Civil Rights Crusade?*, 10 GEO. MASON U. CIV. RTS. L.J. 115 (1999-2000) (advocating the opportunities offered by charter schools and voucher use by low-income families).

115. See Randal C. Archibold, *What is Good Education? It Depends*, N. Y. TIMES, Jan. 14, 2001, at A33.

visit the school.¹¹⁶ This effort is an attempt to bridge economic and social classes and to instill empathy and understanding. Education is common knowledge, personal identity, and place in society.

In cities and towns around the country, young people appear to be forging their own solutions to the blight of racial prejudice. Having met in the schools or through friends, they walk hand-in-hand and head-to-head, apparently without regard to the history that prohibited their affection. The advertising images in the shop windows show widely admired mocha-skinned models of beauty.

Those young relationships sometimes thrive for years, even to maturity and family. Many cannot be sustained, however, because of the significant disparity of achievement between races and ethnic groups in the United States. If the success of arranged marriages based on economic and cultural similarity has any credibility, the young peoples' relationships most likely will founder on economic differences that persist throughout their lifetimes, making differences of style and values more significant and agreement about parenting and life choices into impossible compromises.

For this educator, the disparity is all about education. Early education is the tool that unlocks printed and electronic libraries that convey realms of thought and information, and the orderliness of mind needed to use them. That early education includes the authority and encouragement of the adults in charge because the child is a child and might choose to do something else, or nothing at all. Secondary education and college is the ticket that follows, at a time when the choice of activities for young people is critical. When sex, entertainment, and social success beckon, the teenager has to know what to choose and has to have deeply felt reasons to stick to an agenda of intellectual and emotional achievement.

Without support from the adults closest to them, that is virtually impossible. For most, breaking with a culture of family and childhood unfamiliar with their learned aspirations is too hard, the path forward too lonely and uncertain.¹¹⁷ Support need not be perfect; it just needs to be enough.

Milwaukee cannot afford to pass up the best opportunities to sow the

116. *Id.*

117. See generally Christian Sundquist, Note, *Equal Opportunity, Individual Liberty, and Meritocracy in Education: Reinforcing Structures of Privilege and Inequality*, 9 GEO. J. ON POVERTY L. & POL'Y 227 (2002) (discussing the transitions of a low-income, African American who succeeded in mainstream higher education).

seeds for achievements of this generation. The clock indeed is ticking,¹¹⁸ and the time to overcome is now.¹¹⁹

118. See Hall, *supra* note 95, at 115.

119. Kane, *supra* note 65, at 3B (quoting Bill Cosby's paraphrase of Martin Luther King, Jr.'s speech and song, which originally said, "We shall overcome someday").

* * *